

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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ALTERRA AMERICA INSURANCE COMPANY,

Index No. 652813/2012 E

Plaintiff,

-against-

**AFFIRMATION OF
HEATHER E. SIMPSON**

NATIONAL FOOTBALL LEAGUE AND NFL
PROPERTIES, LLC, et al.,

Defendants.

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DISCOVER PROPERTY & CASUALTY
COMPANY, et al.,

Plaintiffs,

-against-

NATIONAL FOOTBALL LEAGUE, NFL
PROPERTIES LLC., et al.,

Defendants.

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HEATHER E. SIMPSON, ESQ., an attorney duly admitted to practice before the courts of the State of New York, hereby affirms the following to be true and under penalty of perjury:

1. I am a partner of the law firm of Kennedys CMK LLP, counsel for Defendants TIG Insurance Company, The North River Insurance Company and United States Fire Insurance Company (“TIG”), in the above-captioned matter (the “Coverage Action”). As such, I have personal knowledge of the facts and circumstances contained

herein, the source of my knowledge being the records and files maintained by my office in the ordinary course of handling this matter.

2. I respectfully submit this Affirmation in support of the Insurers' Memorandum of Law in Opposition to the Motion for Protective Order of the "Non-Party Teams," who are collectively defined to include: Arizona Cardinals Football Club, LLC; the Chargers Football Company, LLC; the Forty Niners Football Company, LLC; The Los Angeles Rams, LLC; The Oakland Raiders, LLP; PDB Sports, Ltd. d/b/a Denver Broncos; the Jacksonville Jaguars, LLC; the Miami Dolphins, Ltd.; the Buccaneers Team LLC; the Atlanta Falcons Football Club, LLC; The Chicago Bears Football Club, Inc.; the Indianapolis Colts, Inc.; the New Orleans Louisiana Saints, LLC; the Baltimore Ravens Limited Partnership; Pro-Football, Inc. d/b/a Washington Redskins; the New England Patriots, LLC; The Detroit Lions, Inc.; the Minnesota Vikings Football Club, LLC; the Kansas City Chiefs Football Club, Inc.; the New York Jets, LLC; the Panthers Football, LLC d/b/a Carolina Panthers; the Cincinnati Bengals, Inc.; the Cleveland Browns Football Company, LLC; the Philadelphia Eagles, LLC; the Pittsburgh Steelers, LLC; the Tennessee Football, Inc.; the Dallas Cowboys Football Club, Ltd.; Houston NFL Holdings, LP d/b/a Houston Texans; Football Northwest, LLC d/b/a Seattle Seahawks; the Green Bay Packers, Inc.; the Buffalo Bills, LLC; and the New York Football Giants, Inc.

3. The Insurers' Memorandum of Law further responds to the papers filed by the National Football League and NFL Properties LLC (the "NFL Parties") in support of the Non-Party Teams' Motion for Protective Order.

4. The Insurers joining in this opposition brief are as follows: TIG Insurance Company, The North River Insurance Company, United States Fire Insurance Company, Discover Property & Casualty Insurance Company, St. Paul Protective

Insurance Company, Travelers Casualty & Surety Company, Travelers Indemnity Company, Travelers Property Casualty Company of America, Continental Insurance Company, Continental Casualty Company, Bedivere Insurance Company, ACE American Insurance Company, Century Indemnity Company, Indemnity Insurance Company of North America, California Union Insurance Company, Illinois Union Insurance Company, Westchester Fire Insurance Company, Federal Insurance Company, Great Northern Insurance Company, Vigilant Insurance Company, Allstate Insurance Company, Munich Reinsurance America, Inc., XL Insurance America Inc., XL Select Insurance Company, American Guarantee and Liability Insurance Company, and Arrowood Indemnity Company.

5. Between August 2017 and August 2018, the Insurers served each of the 32 Non-Party Teams with a separate Subpoena Duces Tecum, which contain substantively identical requests for documents, other than a few requests that are specific to that team. (the “Subpoenas”). See, e.g., Ex. C.

6. Each of the 32 Non-Party Teams of the NFL are represented by the law firm of Proskauer Rose LLP in connection with the Subpoenas.

7. Between 2017 and June 2018, the Non-Party Teams, through Proskauer Rose, provided non-substantive responses and numerous objections to the Subpoenas. See, e.g., Ex. D.

8. During that time and continuing until November 2018, counsel for the Insurers engaged in numerous e-mail exchanges and phone calls with Proskauer Rose for the purpose of “meeting and conferring” with respect to compliance with the similar Subpoenas issued to each of the Non-Party Teams. In particular, counsel for certain Insurers and the Non-Party Teams engaged in extensive “meet and confer” teleconferences on January 18, 2018, March 9, 2018, August 30, 2018, and October 24,

2018 and exchanged various correspondence, including substantive letters dated September 24, 2018 (to Proskauer) October 11, 2018 (from Proskauer) and dated November 14, 2018 (to Proskauer). See Exs. E, F, and G.

9. During the above-referenced teleconferences, while counsel for the Non-Party Teams referenced and reasserted various objections to the Subpoenas (which the Insurers disagreed with), they also consistently represented that each of the Non-Party Teams was working diligently to identify and collect documents responsive to the individual Subpoenas that each had received. Proskauer Rose did not provide, however, details as to what efforts, if any, were being undertaken by the Non-Party Teams and would not commit to any timeframe for producing any documents (including types of documents that they expressly stated would be produced, such as document retention policies).

10. The Non-Party Teams' attorneys also referred during these teleconferences to potential privilege issues with respect to documents otherwise responsive to the Subpoenas. Specifically, counsel articulated that responsive documents in the possession of any one of the Non-Party Teams would not be produced until they had been separately provided to and reviewed by the NFL Parties for the purpose of evaluating potential privileges that the NFL Parties might assert over such documents.

11. During the final "meet and confer" teleconference on October 24, 2018, counsel for the Insurers and the Non-Party Teams acknowledged that an impasse existed with respect to the Insurers' requests and the Non-Party Teams' objections and, therefore, the Insurers demanded that the Non-Party Teams simply produce all non-privileged documents that were in their possession, custody, or control within 30 days of that call.

12. By letter to Proskauer dated November 14, 2018, the Insurers reiterated their demand that documents responsive to each of the Subpoenas be produced immediately and set forth a November 30, 2018 deadline. See Ex. G.

13. On November 30, 2018, by email, 14 of the 32 Non-Party Teams produced a combined total of 189 documents to the Insurers, all of which were related to only one category of documents requested under the Subpoenas (insurance policies).¹

14. Also on November 30, 2018, 15 Non-Party Teams, some of which had produced insurance documents and some of which had made no production whatsoever, provided the Insurers with a single privilege log indicating that these 15 Non-Party Teams had withheld a combined total of 24 allegedly privileged documents identified as "Written policies and correspondence providing or reflecting legal advice regarding document and data management, retention and preservation requirements in accordance with applicable law" are identified as being subject to a claim of privilege.² See Ex. H.

15. To date, the Non-Party Teams have still only produced 189 total documents in response to the 32 Subpoenas.

16. The Insurers await the Non-Party Teams' production of additional documents due to be produced by June 1, 2019, pursuant to this Court's April 29, 2019 Order. See Ex. I.

17. Attached hereto as **Exhibit A** is a true and correct copy of the Second Amended Master Administrative Long-Form Complaint filed against the NFL Parties in

¹ The Non-Party Teams that produced these insurance policy documents were: Arizona Cardinals, Atlanta Falcons, Baltimore Ravens, Carolina Panthers, Chicago Bears, Green Bay Packers, Indianapolis Colts, Jacksonville Jaguars, Los Angeles Rams, Miami Dolphins, Oakland Raiders, Philadelphia Eagles, Pittsburgh Steelers, and San Francisco Forty-Niners.

² The Non-Party Teams joining in this collective privilege log are: Arizona Cardinals, Baltimore Ravens, Carolina Panthers, Chicago Bears, Cleveland Browns, Houston Texans, Indianapolis Colts, Jacksonville Jaguars, Miami Dolphins, Minnesota Vikings, Philadelphia Eagles, Pittsburgh Steelers, and San Francisco Forty-Niners, Buffalo Bills and New York Jets.

the multi-district litigation captioned In Re National Football League Players' Concussion Injury Litigation, MDL 2323, in the United States District Court for the Eastern District of Pennsylvania.

18. Attached hereto as **Exhibit B** is a true and correct copy of the Stipulation and Order for Production and Exchange of Confidential Information entered by the Court in the Coverage Action on May 22, 2013.

19. Attached hereto as **Exhibit C** is a true and correct copy of the Subpoena Duces Tecum served on the New York Football Giants, Inc., which serves as an example of the substantially similar 32 separate subpoenas served on each of the Non-Party Teams.

20. Attached hereto as **Exhibit D** is a true and correct copy of the New York Football Giants, Inc.'s Objections and Responses to the Subpoena Duces Tecum dated November 15, 2017, which serves as an example of the substantially similar objections provided by each of the Non-Party Teams in response to the subpoena that each received.

21. Attached hereto as **Exhibit E** is a true and correct copy of the letter from Mark F. Hamilton, Esq. of Kennedys CMK LLP, on behalf of the Insurers, to the Non-Party Teams' attorneys at Proskauer Rose LLP, dated September 24, 2018.

22. Attached hereto as **Exhibit F** is a true and correct copy of the letter from John Failla, Esq. and Seth Schafler, Esq. of Proskauer Rose LLP, to Mark F. Hamilton, Esq. dated October 11, 2018.

23. Attached hereto as **Exhibit G** is a true and correct copy of the letter from Mark F. Hamilton, Esq. to attorneys at Proskauer Rose, LLP dated November 14, 2018.

24. Attached hereto as **Exhibit H** is a true and correct copy of the privilege log of certain of the Non-Party Teams dated November 30, 2018.

25. Attached hereto as **Exhibit I** is a true and correct copy of the Order of this Court dated April 29, 2019.

26. Attached hereto as **Exhibit J** is a true and correct copy of the Transcript of the April 29, 2019 hearing before the Honorable Andrea Masley.

Dated: New York, New York

May 31, 2019

By:


Heather E. Simpson

CERTIFICATION OF COMPLIANCE WITH WORD LIMITATION

I hereby certify that the Insurers' Memorandum of Law and this Affirmation complies with the 7,000-word limitation under Commercial Division Rule 17. Based on Microsoft Word's word count function, the total number of words in the Insurers' Memorandum of Law, including point headings and footnotes but excluding the caption and signature block is 6,972. Based on Microsoft Word's word count function, the total number of words in this Affirmation, including point headings and footnotes but excluding the caption and signature block is 1,561.

Dated: New York, New York
May 31, 2019

By:


Heather E. Simpson